

² The Board notes that appellant submitted additional evidence on appeal. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 20, 2019 appellant, then a 40-year-old lead sales and services clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 14, 2019 she sustained an injury when she moved and lifted a customer's parcel while in the performance of duty. She did not indicate which part of her body sustained injury. Appellant stopped work on September 16, 2019.

In a development letter dated September 25, 2019, OWCP informed appellant of the deficiencies of her claim and advised her of the type of factual and medical evidence necessary to establish her claim. It also provided a questionnaire for her completion. OWCP afforded her 30 days to submit the necessary factual and medical evidence.

In notes dated September 20 and 27 and October 11, 2019, Dr. John Rees, a chiropractor, certified that appellant was under his care for an injury sustained on September 14, 2019 and that he recommended she not return to work until further notice.

Appellant responded to OWCP's development questionnaire on October 23, 2019. She explained that on September 14, 2019 she lifted and handled a heavy box that aggravated her neck and back, causing neck, back, and leg pain. Appellant noted that she had not returned to work as of October 23, 2019 and that she had been advised that she could not return to work until she was able to do so with no restrictions, but that she had also received information that she should be allowed to return to work with restrictions.

By decision dated October 31, 2019, OWCP denied appellant's claim, finding that she had not submitted sufficient medical evidence to establish a medical diagnosis in connection with the incident of September 14, 2019. It further noted that, as the medical evidence in appellant's claim was from a chiropractor, and as he did not diagnose a subluxation of the spine, his report could not establish the medical portion of her claim under FECA. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a report dated November 25, 2019, Dr. Joseph Karnish, an osteopath specializing in family medicine, evaluated appellant for upper and lower back pain with radiation into the right upper and lower extremities related to an incident that occurred at work on September 14, 2019. Appellant told Dr. Karnish that on that date she lifted a 50-pound box while on duty and noted a burning pain emanating from her neck to her right lower back and into the toes of her right foot. Dr. Karnish diagnosed lumbar pain, upper back pain, and radicular pain of the right upper and lower extremities.

In a letter dated June 25, 2020, Dr. Karnish noted that appellant had undergone a lumbosacral injection with described aggravation of appellant's radicular symptoms by the end of the procedure. Appellant told Dr. Karnish that her acute pain related to the procedure had resolved,

but that she had not noted an improvement from her baseline pain. Dr. Karnish recommended that appellant be medically excused from work from June 15 through July 31, 2020 after completion of the next stage of her treatment course.

In a report dated October 26, 2020, Dr. Manonmani Antony, a physician Board-certified in anesthesiology and pain medicine, noted that appellant sustained lumbar pain beginning September 14, 2019 due to a work-related injury of moving a heavy box. She noted that appellant had undergone spinal steroid injections on June 1, August 24, and October 26, 2020. Dr. Antony diagnosed lumbar and lumbosacral radiculopathy, spondylosis with radiculopathy, chronic pain, and long-term current use of opiate analgesic.

On November 2, 2020 appellant requested reconsideration. Accompanying the request was a letter dated October 26, 2020 from appellant in which she explained that she did not receive the development letter of September 25, 2019 until October 23, 2019, as it had been delivered to her neighbor, who gave it to her on the latter date. Appellant explained that she was under the impression she had only 30 days to dispute the decision of OWCP and that her magnetic resonance imaging (MRI) scans were scheduled after that period. She also resubmitted her responses to OWCP's development letter dated October 23, 2019.

In an attached letter from Dr. Karnish dated October 27, 2020, he opined that appellant's diagnosed lumbar radiculopathy was the result of her lifting a box while in the performance of duty on September 14, 2019. Dr. Karnish reviewed her history of injury and treatment, noting that MRI scan studies had demonstrated significant findings including mild levoscoliosis, anterior listhesis of L5 over S1, chronic right and left-sided pars defect; mild facet sclerosis and hypertrophy with fluid within the L5-S1 facet joint and reactive signal suggestive of facet arthropathy; a mild chronic-appearing broad-based disc bulge at L4-5, and a more pronounced chronic-appearing mild broad-based right and left lateralizing disc bulge coupled with facet hypertrophy, resulting in mild-to-moderate bilateral foraminal narrowing. He noted that Dr. Antony suggested an L5-S1 disc herniation as the cause of appellant's right-sided lumbar radiculopathy.

By decision dated January 28, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

³ 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁷ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.¹⁵ The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁶ See *M.E.*, *supra* note 3; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); see also *id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (September 2020).

⁹ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); see *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

¹¹ *J.F.*, *supra* note 9; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Id.*

¹⁴ *J.F.*, *supra* note 9; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *Supra* note 5.

development, is not clear evidence of error.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision.¹⁸ The most recent merit decision was OWCP's October 31, 2019 decision, which denied her claim for traumatic injury. As OWCP received her request for reconsideration on November 2, 2020, more than one year after the October 31, 2019 merit decision, the Board finds that the request was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁹

In support of appellant's request for reconsideration, OWCP received a statement from appellant dated October 26, 2020, a report from Dr. Antony dated October 26, 2020, and letters and reports from Dr. Karnish dated November 25, 2019, June 25 and October 27, 2020. Appellant also resubmitted her responses to OWCP's development letter dated October 23, 2019.

The Board finds that the medical evidence submitted on reconsideration is insufficient to demonstrate that OWCP's October 31, 2019 decision was in error at the time it was issued.²⁰ Appellant's claim was denied by OWCP because she had not submitted sufficient medical evidence to establish a medical diagnosis in connection with the accepted employment incident of September 14, 2019. The November 25, 2019 report of Dr. Karnish includes diagnoses of lumbar pain, upper back pain, and radicular pain of the right upper and lower extremities. Under FECA, the assessment of pain is not considered a diagnosis, as pain merely refers to a symptom of an underlying condition.²¹ The June 25, 2020 letter did not contain any medical diagnosis related to her traumatic injury claim. The October 26, 2020 report of Dr. Antony did not contain an opinion as to the causal relationship between the incident of September 14, 2019 which resulted in diagnoses of lumbar and lumbosacral radiculopathy, spondylosis with radiculopathy, chronic pain, and long-term current use of opiate analgesic and is of no probative value on the issue of causal

¹⁶ *P.H.*, Docket No. 19-1354 (issued March 13, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (September 2020).

¹⁷ *See M.E.*, *supra* note 3; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁸ *Supra* note 4.

¹⁹ *Id.*

²⁰ *A.S.*, Docket No. 18-1556 (issued September 17, 2019); *L.B.*, Docket No. 19-0635 (issued August 23, 2019).

²¹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018). The Board has consistently held that pain is a symptom, not a compensable medical diagnosis. *See P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

relationship.²² The October 27, 2020 medical report of Dr. Karnish included an opinion as to causal relationship, but it was not accompanied by supporting rationale as to how appellant's lumbar radiculopathy was caused by the incident of September 14, 2019. Medical opinion evidence should offer a medically sound explanation of how the specific employment incident or work factors physiologically caused injury.²³ Appellant's response to OWCP's development letter dated October 23, 2019 was already of record at the time of OWCP's October 31, 2019 decision. Lastly, her statement dated October 26, 2020 was not medical evidence and, as such, was irrelevant to the underlying basis for denial of her claim.

The term "clear evidence of error" is intended to represent a difficult standard and the evidence provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error in its October 31, 2019 decision.²⁴ The Board finds that the medical evidence submitted on reconsideration is insufficient to shift the weight of the evidence in favor of her claim or raise a fundamental question as to the correctness of OWCP's decision denying her request for reconsideration.²⁵

As the evidence submitted in support of appellant's untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of her claim or raise a substantial question that OWCP erred in its October 31, 2019 decision, the Board finds that OWCP properly denied her reconsideration request.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim finding that it was untimely filed and failed to demonstrate clear evidence of error.

²² *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²³ *See H.A.*, Docket No. 18-1466 (issued August 23, 2019); *L.R.*, Docket No. 16-0736 (issued September 2, 2016).

²⁴ *Supra* note 5 at Chapter 2.1602.5 (September 2020); *see also* 20 C.F.R. § 10.607(b).

²⁵ *C.M.*, Docket No. 19-0585 (issued August 15, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board